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## **INTERNATIONAL TRADE COMMISSION**

**[Investigation No. 337-TA-1098]**

### **Certain Subsea Telecommunication Systems and Components Thereof; Notice of a Commission Determination to Review In Part a Final Initial Determination Finding No Violation of Section 337 and to Extend the Target Date; Schedule for Filing Written Submissions**

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the U.S. International Trade Commission has determined to review in part the Administrative Law Judge's ("ALJ") final initial determination ("ID"), issued on April 26, 2019, finding no violation of section 337 in the above-referenced investigation and to extend the target date for completion of the above-referenced investigation to September 30, 2019. The Commission requests briefing from the parties on certain issues under review, as indicated in this notice.

**FOR FURTHER INFORMATION CONTACT:** Cathy Chen, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205-2392. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205-2000. General information concerning the Commission may also be obtained by accessing its Internet server at <https://www.usitc.gov>. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at <https://edis.usitc.gov>. Hearing-impaired persons are advised that information on this

matter can be obtained by contacting the Commission's TDD terminal on (202) 205-1810.

**SUPPLEMENTARY INFORMATION:** The Commission instituted this investigation on January 26, 2018, based on a complaint, as supplemented, filed on behalf of Neptune Subsea Acquisitions Ltd. of the United Kingdom; Neptune Subsea IP Ltd. of the United Kingdom; and Xtera, Inc. of Allen, Texas (collectively, "Xtera"). 83 FR 3770 (Jan. 26, 2018). The complaint, as supplemented, alleges violations of Section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337 ("section 337"), based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain subsea telecommunication systems and components thereof by reason of infringement of one or more claims of U.S. Patent Nos. 8,380,068; 7,860,403 ("the '403 patent"); 8,971,171; 8,351,798 ("the '798 patent"); and 8,406,637. The complaint further alleges that an industry in the United States exists as required by section 337. The notice of investigation, as originally issued, named as respondents Nokia Corporation of Espoo, Finland; Nokia Solutions and Networks B.V. of Hoofddorp, The Netherlands; Nokia Solutions and Networks Oy of Espoo, Finland; Alcatel-Lucent Submarine Networks SAS of Boulogne-Billancourt, France; Nokia Solutions and Networks US LLC of Phoenix, Arizona; NEC Corporation of Tokyo, Japan; NEC Networks & System Integration Corporation of Tokyo, Japan; and NEC Corporation of America of Irving, Texas. The Office of Unfair Import Investigations was named as a party in this investigation.

The corporate name of Neptune Subsea Acquisitions Ltd. was changed to Xtera Topco Ltd. ID at 3. Respondents Nokia Solutions and Networks B.V.; Nokia Solutions and Networks Oy; and Nokia Solutions and Networks US LLC were terminated from the investigation based on withdrawal of the complaint. *Id.* The corporate name of Alcatel-Lucent Submarine Networks SAS was corrected to Alcatel Submarine Networks. *Id.* Respondent Nokia of America

Corporation of New Providence, New Jersey was later added to the investigation. *Id.*

Of the patents that formed the basis for institution of this investigation, only the '798 patent and the '403 patent remain in dispute. ID at 3-4, 6.

On April 26, 2019, the ALJ issued his final ID and his recommended determination. The ID found no violation of section 337 with respect to asserted claims 13, 15, and 19 of the '798 patent and claims 8, 9, and 12 of the '403 patent by Respondents Nokia Corporation; Alcatel Submarine Networks; and Nokia of America Corporation (collectively "Nokia"); and NEC Corporation; NEC Networks & System Integration Corporation; and NEC Corporation of America (collectively "NEC"). Specifically, with respect to the '798 patent, the ID found that Xtera produced no evidence at the evidentiary hearing to show a violation of section 337 based on infringement of claims 13, 15, and 19. Accordingly, the ID found that Xtera has not established a violation of section 337 based on infringement of the '798 patent. With respect to the '403 patent, the ID found that Respondents do not infringe and Xtera's domestic industry products do not practice claims 8, 9, and 12 of the '403 patent. The ID also found that claims 8, 9, and 12 of the '403 patent are invalid as anticipated by U.S. Patent No. 6,430,336. The ID further found that complainants had not established that complainants' investments and activities satisfied the domestic industry requirement with respect to articles protected by the '403 patent.

On May 13, 2019, Xtera filed a petition for review of the final ID. On the same day, Respondents filed a contingent petition for review of the final ID. Thereafter, the parties filed responses to the petitions for review and public interest comments pursuant to Commission Rule 210.50(a)(4).

Having examined the record of this investigation, including the ID, the petitions for review, and the responses thereto, the Commission has determined to review the ID's findings

with respect to the '403 patent in their entirety, including domestic industry. The Commission does not review the remainder of the ID.

The Commission has determined to extend the target date in this investigation to September 30, 2019.

Xtera originally asserted infringement of claims 8, 9, 12, and 13 of the '403 patent. *See* ID at 6. Xtera, however, presented no evidence or argument regarding claim 13 at the hearing or in post-hearing briefing. The ID makes no findings with respect to claim 13 and Xtera's petition for review does not address that claim. Further, Xtera's petition for review does not address the '798 patent. The Commission hereby determines that Xtera has thus effectively withdrawn its allegations with respect to claim 13 of the '403 patent and the '798 patent.

The parties are requested to brief their positions on only the following issues under review with reference to the applicable law and the evidentiary record.

1. The ID adopts the parties' agreed-upon function for Element 8A to be "producing a periodic series of optical pulses defining a series of time slots, wherein one pulse appears in each time slot." Does the ID's interpretation of the claimed function for Element 8A require the production of a periodic series of "narrow" optical pulses? Did the parties provide argument before the ALJ as to whether or not the claimed function requires the production of a periodic series of "narrow" optical pulses?
2. In view of your response to the first question, please discuss whether the specification or prosecution history clearly links or associates the combination of the light source and the first modulator in the prior art transmitter shown in Figure 1 of the '403 patent to the claimed function for Element 8A.

3. If your positions on the above issues are adopted by the Commission, please explain the effect, if any, on the ID's infringement, invalidity, and technical prong findings.

The parties are not to brief other issues on review, which are adequately presented in the parties' existing filings. At this time, the Commission does not request written submissions on remedy, public interest, or bonding.

*Written Submissions:* Each party's written submission responding to the above questions and any response to the initial submissions should be no more than 50 pages. The written submissions must be filed no later than close of business on Wednesday, August 7, 2019. Reply submissions of no more than 35 pages must be filed no later than the close of business on Wednesday, August 14, 2019. No further submissions will be permitted unless otherwise ordered by the Commission.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above and submit 8 true paper copies to the Office of the Secretary by noon the next day pursuant to Commission Rule 210.4(f), 19 CFR 210.4(f). Submissions should refer to the investigation number ("Inv. No. 1098") in a prominent place on the cover page and/or the first page. (*See Handbook for Electronic Filing Procedures*, [https://www.usitc.gov/secretary/documents/handbook\\_on\\_filing\\_procedures.pdf](https://www.usitc.gov/secretary/documents/handbook_on_filing_procedures.pdf)). Persons with questions regarding filing should contact the Secretary, (202) 205-2000.

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All information, including confidential business

information and documents for which confidential treatment is properly sought, submitted to the Commission for purposes of this Investigation may be disclosed to and used: (i) by the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel, solely for cybersecurity purposes. All contract personnel will sign appropriate nondisclosure agreements. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in Part 210 of the Commission's Rules of Practice and Procedure (19 CFR Part 210).

By order of the Commission.

Issued: July 24, 2019.

**Katherine Hiner,**

*Supervisory Attorney.*

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